

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

CIVIL ACTION NO. 20-cv-00325-MSS-AEP

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

BRIAN DAVISON, et al.,

Defendants.

**SECURITIES AND EXCHANGE COMMISSION'S RESPONSE
OPPOSING DEFENDANT BARRY RYBICKI'S MOTION FOR
ENTRY OF ORDER EXTENDING AND MODIFYING ASSET FREEZE**

Plaintiff Securities and Exchange Commission ("Commission") files this response in opposition to Defendant Barry Rybicki's Motion to modify the asset freeze (D.E. 287) to carve out \$140,789 in *additional funds* to pay his legal defense costs. Having fraudulently procured millions of dollars of investors' funds, Rybicki now seeks to drain additional assets -currently preserved for investors - to pay attorney's fees almost double of what the Court has previously allowed. Moreover, Rybicki is forecasting that additional fee requests are on the horizon which will likely deplete any remaining frozen funds, further harming investors. Thus, the Commission requests that the Court deny Rybicki's Motion as it threatens to further deplete the scarce resources currently available for the benefit

of investors. Moreover, Rybicki has not shown why the some 772 hours his attorneys have logged defending this case are not excessive.

Briefly, additional fees should not be unfrozen because Rybicki has already been given \$155,000 in legal defense fees (plus an additional \$16,000 in legal costs) which should be adequate to pay for a defense in this matter. In opposition to Rybicki's request for additional fees, the Commission states:

FACTUAL BACKGROUND

1. This action was filed on February 11, 2020, following months of investigation by the SEC during which time Defendants were all represented by the same counsel, DLA Piper, LLC. In the months immediately preceding this action (from 09/1/19-1/31/20), DLA Piper was paid more than \$500,000¹ by EquiAlt for their representation of EquiAlt, Davison and Rybicki in the SEC's investigation.

2. In January 2020, Rybicki retained independent counsel and on February 13, 2020, *one day* before the asset freeze was entered, EquiAlt paid Rybicki's new counsel, Sidley Austin, a \$50,000 retainer.

¹ DLA had a separate billing number to account just for work done relating to the SEC's inquiry to separate that work from other corporate work DLA performed for EquiAlt. The \$500,000 does not include an additional \$75,000 DLA billed in February 2020 on the SEC inquiry that the Receiver has not paid.

3. On February 14, 2020, the Court entered an Order freezing the Defendants' assets (D.E. 10). As part of that Order, the Court included a provision that additional attorney's fees be provided for the individual defendants, including Rybicki. The Order states that, "The Commission and the Receiver appointed by this Court shall provide the Individual Defendants access to *reasonable* amounts of their personal assets for necessary living expenses and legal fees." (italics added).

4. On February 28, 2020, pursuant to the Court's order, the SEC and Receiver agreed that an additional \$75,000 be provided to Rybicki's counsel. (D.E. 31). On July 28, 2020, the SEC and the Receiver agreed and the Court permitted the asset freeze to be lifted to allow Rybicki's counsel an additional \$30,000 in attorney's fees (D.E. 157). Thus, since February 1, 2020, Rybicki's various counsel have received \$155,000 in attorney's fees, in addition to \$16,000 in costs for experts and discovery for their representation of Rybicki in this action.

5. In addition to the fees allowed above, the Court has also entered an Order outlining the process under which additional fees are to be requested. (D.E. 54). In the instant Motion, Defendant Rybicki requests that the asset freeze be lifted so that his counsel may be given yet another \$140,789 for his attorney's fees, submitting an *in camera* budget setting forth the breakdown of fees incurred for

which compensation has not been paid, after they have already been incurred. Although the details of how these fees were incurred are unknown to the undersigned (having been filed *in camera*) on their face the 772 hours counsel asserts that they have logged appears excessive.

6. Moreover, the preliminary injunction in this matter has already been granted, the Court having found that “the evidence shows that the Defendants most likely operated as a Ponzi scheme while simultaneously siphoning funds for their own benefit far and above any amount that anyone might reasonable believe was disclosed to investors.” *Order* (D.E. 184). While the SEC would not object to some additional funds be unfrozen to pay the attorney’s fees necessary to conduct a mediation, limited discovery or tasks related to increasing the Receivership estate, the current request is not so narrowly tailored. Instead, the current request is apparently for reimbursement related to defend against the Preliminary Injunction, for which sufficient fees have already been allotted.

MEMORANDUM OF LAW

A. Frozen Assets Should Not Be Used to Fund Rybicki’s Defense

As a preliminary matter, Rybicki is not entitled to use frozen assets to pay for his attorneys’ fees. *See SEC v. Comcoa*, 887 F. Supp. 1521, 1524 (S.D. Fla. 1995) (“In imposing a freeze of assets, there is no requirement that the court exempt sufficient assets for the payment of legal fees.”); *CFTC v. United Investors Group*,

Inc., 2005 WL 3747596, n. 1 (S.D. Fla. Jan. 3, 2005) ([T]he court has discretion to limit or forbid payment of attorney fees out of frozen assets). Furthermore, Sixth Amendment considerations do not support modifying an asset freeze where, as here, criminal charges have not been filed. *CFTC v. Rust Rare Coin Inc.*, 2019 WL 752424 (D. Utah, April 4, 2019); *SEC v. Santillo* 2018 WL 3392881, *5 (S.D.N.Y. July 11, 2018) (requests for attorney's fees for defense of a parallel criminal matter are not ripe until charges have been brought).

B. Rybicki's Ill-Gotten Gains Exceed the Frozen Assets

It is routine in SEC cases for assets to remain frozen when the defendant has not demonstrated that there are sufficient frozen assets to pay disgorgement. *Santillo* 2018 WL 3392881 at *4 (citing *SEC v. Lauer*, 445 F. Supp. 2d 1362, 1369 (S.D. Fla. 2006); *SEC v. Current Fin. Servcs.*, 62 F. Supp. 2d 66, 68 (D.D.C. 1999)). Therefore, defendants have been "barred from utilizing frozen assets to pay legal fees associated with representation in a civil action when it is not clear 'whether the frozen assets exceed the SEC's request for damages' or disgorgement." *Id.* at 4 (quoting *SEC v. FTC Capital Mkts, Inc.*, 2010 WL 2652405, *7 (S.D.N.Y. June 30, 2010)); *FTC v. RCA Credit Services, LLC*, 2008 WL 5428039, *4 (M.D. Fla. Dec. 31, 2008) (defendants "may not use their victims' assets to hire counsel to help them retain the fruits of their violations"); see also *FTC v. Simple Health Plans LLC*, 379

F.Supp.3d 1346, 1364 (S.D. Fla. 2019) (denying carve out for attorneys' fees and living expenses given the "vast disparity between Defendants' substantial ill-gotten gains and the value of the frozen assets"); *FTC v. IAB Marketing*, 972 F. Supp. 2d 1307, 1313 (S.D. Fla. 2013) (denying defendants' motion to "unfreeze" funds for living expenses where "Defendants' monetary liability greatly exceeds the frozen funds"); *CFTC v. United Investors Group, Inc.*, 2005 WL 3747596, *1 n.1 (S.D. Fla. June 9, 2005) (refusing to except living expenses and counsel fees from asset freeze), *aff'd* on other grounds sub nom. *CFTC v. Levy*, 541 F.3d 1102 (11th Cir. 2008).

Here, Rybicki has failed to show that there are enough frozen assets to satisfy the likely multi-million dollar disgorgement award against him. Nor has he provided a financial affidavit despite the Receiver's request to do so. *See also SEC v. Founding Partners Capital Mgmt.*, 2009 WL 10669238, *4 (M.D. Fla. May 7, 2009) (denying carve out to pay attorney's fees and living expenses because "defendant has provided no factual basis that would allow the Court to make a reasoned decision as to whether any modification should be made, or the amounts that should be exempted."); *Consumer Fin. Prot. Bureau v. Orion Processing, LLC*, 2016 WL 10516183, *2 (S.D. Fla. Apr. 29, 2016) (denying modification of asset freeze to allow for attorneys' fees and living expenses where "Defendant has failed to

show that any of his requested funds are necessary, particularly in light of the fact that the assets frozen thus far fall significantly short of the amount allegedly needed to compensate Defendant's customers for their losses.").

For context, the SEC asserts, and the Receiver has confirmed, that there is approximately \$59 Million outstanding and owed to investors in principal and interest payments. Moreover, the Receiver has demonstrated that Rybicki personally received more than \$13 Million in direct and indirect payments from the Funds, that the Commission will seek to be disgorged. Ultimately, it is unlikely that the assets currently frozen will be anywhere near sufficient for Rybicki to satisfy his disgorgement obligation.

C. Rybicki's Proposed Budget Is Excessive

In addition to Rybicki's failure to meet the threshold requirement to unfreeze funds, Rybicki's proposed budget fails on its own terms. Rybicki seeks another \$140,789 for work already performed in this matter and an unknown amount for future expenses. The motion does not specify how many hours were spent on specific tasks or time periods within which this time was spent. Thus, the SEC cannot offer comment as to whether specific hours were reasonably spent. However, this amount is generally unreasonable given the (1) pre-discovery evidence already provided to Rybicki (the Commission's entire investigative file, and the reports provided by the Receiver confirming the Commission's allegations

of fraud and misappropriation by Rybicki, DE 84, 179, 217, 265) and (2) the discovery conducted to date (*see e.g.*, Rybicki's deposition, the Commission's production of documents, responses to interrogatories and admissions, and the Receiver's production of all emails with Defendants per Rybicki's request).

Moreover, the preliminary injunction in this matter has already been granted (D.E. 184). Thus, Rybicki's request to more than double the attorney's fees he has already received appears excessive.

II. The Receiver's Fees Have Nothing To Do With Rybicki's Defense Fees

Rybicki's attempt to compare his proposed fees to those incurred by the Receiver falls flat. The Receiver's role is: 1) to marshal and distribute the assets of the Receivership Defendants *for the benefit of investors* and 2) to run the business interest of Equialt and the Funds, including the running of a property rental business. These tasks have no bearing whatsoever upon Rybicki's efforts to defend his own wrongful actions. The Receiver is working to *recover* money for investors defrauded by Rybicki, Davison and multiple sales agents while Rybicki seeks to *spend* money that should be preserved for investors to fund his defense. It also cannot be overlooked that the Receiver has had to piece together Rybicki's years-long fraud involving several entities, unlike Rybicki who knows full well what has transpired.

Moreover, the actual work product and invoices submitted by the Receiver versus the motion submitted by Rybicki's counsel betray the false equivalence Rybicki puts forth. *Compare* Receiver's Quarterly Reports at DE 84, 179, 217, 265, and Receiver's Fee Applications, DE 88, 186, 218, 266 *with* Rybicki's Motion for Entry of Order (D.E. 287). At no point has Rybicki directed efforts to trace funds, marshal assets, voluntarily turn over assets at the outset for investor distribution, or to offer any assistance or facts to Receiver or the Commission. Instead, Rybicki took the Fifth Amendment during his deposition and has fought the SEC at almost every turn.

The SEC and the Receiver seek to keep as much of Rybicki's assets frozen as possible so that they will be available for return to investors, if and when ordered to do so. Thus, the SEC requests that the Court's Order regarding the process for applying for additional attorney's fees remain in place as described above.

April 19, 2021

Respectfully submitted,

By: s/Alise Johnson
Alise Johnson
Senior Trial Counsel
Fl. Bar No. 0003270
E-mail: johnsonali@sec.gov
Lead Attorney

Attorney for Plaintiff
**SECURITIES AND EXCHANGE
COMMISSION**
801 Brickell Avenue, Suite 1950

Miami, Florida 33131
Telephone: (305) 982-6300
Facsimile: (305) 536-4154

CERTIFICATE OF SERVICE

I hereby certify that on April 19, 2021, I electronically filed the foregoing Response with the Clerk of the Court using CM/ECF, which will send a notice of such filing to all counsel of record.

BY: /s/ Alise Johnson